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EXPORT-IMPORT BANK OF MALAYSIA BHD

v.

HARAPAN SERENTAK SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
HASNAH MOHAMMED HASHIM J
[CIVIL SUIT NO: 22NCC-1224-08-2012]
6 MAY 2014

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BANKING: *Securities for advances - Guarantee - Loan secured by corporate guarantee and joint and several guarantee - Restructuring and additional funds - Restructuring agreement - Due diligence and verification exercise - Whether there was delay in compliance of condition precedent - Recalling of loan - Whether termination of facility valid - Whether guarantors held liable for default by borrower - Whether certificate of indebtedness conclusive proof of debt*

D

- Whether guarantors could counterclaim for damages due to delay

CONTRACT: *Guarantee - Banker's guarantee - Guarantor's liability - Whether guarantor liable for default by borrower - Whether bank guarantee was unconditional and an on demand guarantee - Whether payment should be effected notwithstanding any contestation*

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Pursuant to a facility agreement dated 29 May 2007 ('the facility'), the plaintiff granted a USD70 million term loan facility to Shenyang Shenyang Amusement Park Co Ltd ('the borrower') to partly finance a development and construction of an amusement park known as "Magic

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Goat Paradise" ('the project') in China. One of the conditions of the said facility was that a corporate guarantee would be given to the plaintiff for the repayment and discharge of the indebtedness and for the performance of the obligations under the said facility. The first defendant, a company incorporated in Malaysia provided a corporate

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guarantee in favour of the plaintiff. The corporate guarantee specifically provided that the first defendant unconditionally and irrevocably guaranteed, as principal debtors on demand, the repayment of the indebtedness to the plaintiff. A joint and several guarantee agreement ('JSGA') dated 29 May 2007 was executed by the second and third

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defendants in favour of the plaintiff. The second and third defendants were jointly, severally, unconditionally and irrevocably guaranteed as a continuing obligation to the plaintiff as principal debtors and not merely as sureties, on demand the repayment by the borrower of the indebtedness to the plaintiff. The facility was fully drawn down by the

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borrower in five tranches. The borrower alleged that the sum of USD70 million was insufficient to complete the project and applied for additional funds from the plaintiff. The plaintiff issued a letter of offer ('LOA') dated 9 August 2010 for the restructuring of the aforesaid facility as well

as for the additional fund of USD55 million. On 20 October 2010, the plaintiff and the borrower entered into a restructuring agreement ('RA') to reschedule the facility and the additional fund of RM55 million to complete the construction of the project. The defendants were not parties to the RA. A second legal charge under the laws of the Republic of China over the project land and over the lease right of the project land was to be created as part of the terms and conditions of the RA. As a condition precedent ('CP') of the RA, the borrower was given a checklist of the information required by the plaintiff for the due diligence and the verification regarding the legality and validity of the mortgage and the project land from the Tiexi District Government. Since the borrower failed to provide the required documents and information to enable the due diligence and verification exercise to be carried out effectively, the plaintiff terminated the RA. After the termination, the USD70 million was terminated and recalled by the plaintiff. The plaintiff claimed against the defendants for the outstanding sum of USD78,249,610.85 with interest due under the said facility. It was the contention of the plaintiff that the defendants were liable as the guarantors of the facility. The defendants, however, contended that they were not indebted to the outstanding sum. The defendants also contended that there was a manifest error in the certificate of indebtedness as it did not specify the interest rate, interest periods and details of calculations. The defendants argued that the borrower had acted in good faith and cooperated with the plaintiff's due diligence and verification exercise and had fulfilled all the terms and conditions of the RA. Further, it was the submission of the defendants that the due diligence exercise of seven months undertaken by the plaintiff was inordinately long and unreasonable. As a result, the borrower suffered substantial loss of USD200 million. Therefore, the first defendant counterclaimed against the plaintiff for the losses suffered as a result of the recall and termination of the facility.

Held (allowing plaintiff's claim with costs; dismissing first defendant's counterclaim):

(1) The words contained in the guarantee were clear and precise. Once a demand was issued, the first defendant must make payment and fulfil its obligations under the said corporate guarantee. If a bank guarantee was an unconditional and an "on demand" bank guarantee, payment should be effected notwithstanding any contestation when a valid demand on the bank guarantee was made. All that was required was a demand *simpliciter* to trigger the obligation to make payment. Therefore, the first defendant was liable to make payment to the plaintiff and it was not necessary for the plaintiff to prove any default by the borrower. (para 19)

(2) The defendants failed to establish any evidence of bad faith by the plaintiff. Both the documentary and oral evidence showed that the borrower had not fully cooperated in the due diligence and verification exercise thus causing the delay. The LOA for the RA dated 9 August 2010 required a security of a second legal charge in order to comply with the condition for the additional USD55 million facility. The borrower failed to comply with the CP as required by the terms of the letter of offer. Thus, the termination of the facility by the plaintiff was valid due to the non-fulfilment of the CP. (paras 39 & 42)

(3) By the terms of the guarantee, the defendants agreed that the said certificate of indebtedness was binding and conclusive. Therefore, the defendants were clearly misconceived as the guarantee was a continuing guarantee and meant to cover the whole debt, the subsisting debt as well as the future debts. The certificate of indebtedness was clear and lucid. The defendants failed to prove that there was manifest error on the face of the certificate of indebtedness. Therefore, the certificate of indebtedness was binding and conclusive against the defendants as guarantors. (paras 46-48 & 50)

(4) The delay was not due to the plaintiff but was due to the delay of the borrower in responding to the outstanding issues. The first defendant failed to adduce any evidence, oral and documentary, that it had suffered losses. Therefore, the defendants counterclaim was dismissed. (paras 52-55)

Case(s) referred to:

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***

Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2009] 2 CLJ 1 FC ***(refd)***

Perwira Habib Bank Malaysia Bhd v. Fast Travel (M) Sdn Bhd & Ors [1988] 1 LNS 82 HC ***(refd)***

Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd [1987] 1 LNS 79 HC ***(refd)***

For the plaintiff - Lim Koon Huan (Aw Ee Va with him); M/s Skrine

For the 1st defendant - Hemas Ibrahim; M/s The Law Office of K K Chong & Company

For the 2nd & 3rd defendants - Eugene Jeyaraj (A Vishnu Kumar & Sheelaa Ragavan with him); M/s The Law Office of K K Chong & Company

Reported by Sandra Gabriel

JUDGMENT

Hasnah Mohammed Hashim J:

The Plaintiff's Claim

[1] The plaintiff's claim against the defendants are as guarantors for the facility granted in 2007. The claim is for the outstanding sum of USD78,249,610.85 due and payable as at 5 January 2012 together with continuing interest due under the facility.

[2] The First Defendant's Counterclaim

(a) As a result of the plaintiff's action, neglect and in respect of the term loan 1 facility, the restructuring agreement and the additional facility, the borrower has suffered damages estimated to be about USD233,000,000.

(b) The first defendant as owner and holder of 90% of the issued and paid up capital of the borrower, consequently has suffered and incurred damages, losses and expenses amounting to RM209,700,000 or 90% of the USD233,000,000 damages suffered by the borrower.

[3] The first defendant claims:

(a) RM209,700,000 in specific damages;

(b) General damages, losses and expenses;

(c) Costs; and

(d) Such further and/or other relief as this Honourable Court deems fit.

Facts

[4] Sometime in 2007, the plaintiff granted a USD70 million term loan facility under the Overseas Project Financing to Shenyang Shenyang Amusement Park Co Ltd ('the borrower') to partly finance the development and construction of an amusement park known as "Magic Goat Paradise" ("the project") in a town called Shenyang in China upon terms and conditions stated in facility agreement dated 29 May 2007 ('the facility').

[5] The first defendant is a company incorporated in Malaysia which provided the corporate guarantee in favour of the plaintiff. The second and third defendants are directors of the borrower and together with two other individuals, Sun Changsong and Li Meijuan executed the joint and several guarantee agreement dated 29 May 2007 in favour of the plaintiff. Pursuant to the said agreement the second and third defendant

jointly, severally, unconditionally and irrevocably guarantee as a continuing obligation, to the plaintiff as principal debtors and not merely as sureties, on demand the repayment by the borrower of the indebtedness to the plaintiff.

[6] The first defendant is the corporate guarantor and the second and third defendant are the joint and several guarantors for the facility. The facility was drawn down by the borrower in five tranches as follows:

(a) 5 October 2007;

(b) 31 January 2008;

(c) 29 July 2008;

(d) 26 November 2008; and

(e) 28 November 2008.

[7] The borrower and the defendants have not made any repayment of the facility. The plaintiff's claim against the defendant is for the outstanding sum of USD78,249,610.85 due and payable as at 5 January 2012 together with continuing interest thereon due under the said facility.

[8] The borrower claimed that the sum of USD70 million was insufficient to complete the project and applied for additional funds from the plaintiff. The plaintiff issued the letter of offer dated 9 August 2010 for the restructuring of the aforesaid facility as well for the additional fund of USD55 million.

[9] On 20 October 2010, the plaintiff and the borrower entered into a restructuring agreement (RA) to reschedule the facility and the additional fund of RM55 million to complete the construction of the project. The defendants are the corporate guarantor and the joint and several guarantors of the USD70 million facility respectively. Both the defendants are not parties to the RA.

[10] It was agreed as a condition precedent (CP) of the RA that a due diligence investigation and verification exercise would be conducted.

[11] Terms And Conditions Of The Restructuring Agreement (RA)

(1) A second legal charge or its equivalent under the laws of the People Republic of China (PRC) over the project and over the lease right of the project land. (Re: cl. 1 of the letter of offer dated 9 August 2010);

(2) Legal opinions that all relevant searches on the project lands on which the project shall be constructed have been conducted confirming the legal ownership or rights of the land use thereof and that there are no encumbrances on the project lands confirming the legal impediments to the plaintiff enforcing any or all of its rights, powers and remedies in respect of the project lands and project (section 15 (vii) Second Schedule CP: cl. 3.1.of the RA); and

(3) Documentary evidence in connection with the settlement of litigation summons (section 13 of the Second Schedule CPs (cl. 3.1) of the RA).

[12] The plaintiff appointed legal advisers in China, Mr Li Zeng Li and Ms Janet Yong to conduct the due diligence and investigation exercise on the facility and in particular the project land. A comprehensive checklist was prepared to facilitate the due diligence and verification exercise. Throughout 2011, the plaintiff's representatives had several meetings with the representatives of the Tiexi District Government in China on the status of the project land.

[13] On 17 February 2012, the plaintiff terminated the RA as the borrower failed to provide the required documents and information to enable the due diligence and verification exercise to be carried out effectively. Subsequently after the termination of the said RA, the USD70 million was terminated and recalled by the plaintiff *vide* a letter dated 4 April 2012 issued by the plaintiff's solicitors to the borrower. The plaintiff demanded the outstanding sum due and payable as at the date.

[14] It is the contention of the plaintiff that the defendants are liable as the guarantors of the facility. The defendants do not dispute the facility and the drawdown of the sum of USD70 million to the borrower. The revocation of the RA and followed by the recall of the facility are valid, binding and proper.

[15] The defendants, however, contended that they are not indebted to the outstanding sum. They contended that the borrower had acted in good faith and cooperated with the plaintiff's due diligence and verification exercise. The borrower had in fact fulfilled all the terms and conditions of the RA.

Evaluation Of Evidence

[16] At the trial the plaintiff called two witnesses, Aminuddin Bashah, chief credit officer of the plaintiff (PW1) and Thariq Abdullah, legal officer, senior vice president, Corporate Services Division of the plaintiff (PW2). The defendants called three witnesses, Wan Mohd Noordin bin

Yahya, director of the borrower (DW1), Chen Ying @ Chin Ying, director of the borrower (DW2) and Low Meah Fah, director of the borrower (DW3).

[17] It is the contention of the defendants that they are not indebted to the plaintiff under the facility for the following reasons:

(a) The revocation of the RA and the recall of the facility are not legally valid, binding or proper as the borrower had purportedly acted in good faith and cooperated with the plaintiff;

(b) The borrower had fulfilled all the terms and conditions of the RA;

(c) The plaintiff had confirmed that all the relevant securities documents has been duly complied with to the satisfaction of the plaintiff under Recital "C" of the RA; and

(d) Manifest error in the certificate of indebtedness.

The Corporate Guarantee

[18] The corporate guarantee agreement was executed between the plaintiff and the first defendant. One of the conditions of the said facility is that a corporate guarantee will be given to the plaintiff for the repayment and discharge of the indebtedness and for the performance of the obligations under the said facility. The corporate guarantee specifically provides that the first defendant unconditionally and irrevocably guarantees as a continuing obligation to the plaintiff as principal debtors on demand the repayment of the indebtedness to the plaintiff (cl. 2.1):

> In consideration of EXIM Bank agreeing at the request of the Borrower and of the Corporate Guarantor to grant the Facility to the Borrower the Corporate Guarantor hereby unconditionally and irrevocably guarantees as a continuing obligation, to EXIM Bank as principal debtors and not merely as sureties, on demand the repayment by the borrower of the Indebtedness to EXIM Bank and the due performance of the obligations of the Borrower under the Facility Agreement and upon the terms and conditions herein contained. Notwithstanding anything herein stated or in the Facility Agreement, the aggregate Indebtedness the Corporate Guarantor is liable to EXIM Bank herein shall relate to and be in respect of the Facility of up to a maximum amount to USD70,000,000.00 only.

[19] The first defendant does not dispute the existence of the drawdown of the sum of USD70 million under the said facility neither are they disputing the corporate guarantee. The words contained in the aforesaid guarantee are very clear and precise. Once a demand is issued, the first defendant must make payment and fulfill its obligations under

the said corporate guarantee. The law on 'on demand' guarantees has been succinctly laid out by the Federal Court in the case of *Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* [2009] 2 CLJ 1; [2008] 6 MLJ 636. If a bank guarantee is an unconditional and an "on demand" performance bond/bank guarantee, payment should be effected notwithstanding any contestation when a valid demand on the bank guarantee is made. All that is required is a demand *simpliciter* to trigger the obligation to make payment.

[20] Applying the abovementioned principles I am of the considered view that the first defendant is liable to make payment to the plaintiff and it is not necessary for the plaintiff to prove any default by the borrower.

The Joint And Several Guarantee

[21] The guarantee expressly provides that the second and third defendants jointly, severally, unconditionally and irrevocably guarantee as a continuing obligation to the plaintiff as principal debtors on demand. Clause 2.1 stipulates:

> 2.1 Covenant to repay
>
> In consideration of EXIM Bank agreeing at the request of the Borrower and of the Joint and Several Guarantors to grant the Facility to the Borrower, the Joint and Several Guarantors hereby jointly, severally, unconditionally and irrevocably guarantee as a continuing obligation, to EXIM Bank as principal debtors and not merely as sureties, on demand the repayment by the Borrower of the Indebtedness to EXIM Bank and the due performance of the obligations of the Borrower under the Facility Agreement and upon the terms and conditions herein contained. Notwithstanding anything herein stated in this Agreement or the Facility Agreement, the aggregate Indebtedness the Joint and Several Guarantors are liable to EXIM Bank herein shall relate to and be in respect of the Facility up to a maximum amount as stated in Item 4 of the First Schedule.

[22] It is further provided in cl. 2.2 as follows:

> 2.2 Demand for payment
>
> In the event of the Borrower failing to observe and perform any or the covenants, undertakings, stipulations and terms contained in the Security Documents on the part of the Borrower to be observed and performed or upon the occurrence of an Event of Default pursuant to the Facility Agreement, EXIM Bank shall notwithstanding anything to the contrary in the Facility Agreement, be entitled to demand repayment in full from the Joint and Several Guarantors of the Indebtedness or any part thereof.

[23] The second and third defendants do not dispute the terms and conditions of the said guarantee. The principles expounded in the *Karya Lagenda*'s case will be applicable. Therefore, once a demand is made, the second and third defendants are under an obligation to pay. Since it is an 'on demand guarantee', there is no necessity for the plaintiff to prove default in the performance of the facility agreement.

[24] The second and third defendants have admitted that they had agreed to the terms of the guarantee. Applying the law 'on demand guarantee', I am of the considered view that the second and third defendants are liable as guarantors to make payment once a demand is made by the plaintiff. By the terms of the guarantee the plaintiff need not prove any default by the borrower.

The Drawdown

[25] The total amount of USD70 million was fully and completely drawn down in five tranches. This fact is not disputed by the defendants and confirmed during the cross-examination of DW2:

Q: Can you confirm that this facility of USD70 million has been fully drawn down by the Borrower?

A: Yes.

[26] Through cross-examination it was admitted by both DW2 and DW3 that no repayment has been made by the borrower.

Due Diligence Exercise

[27] It is the submission of the defendants that the due diligence exercise of seven months undertaken by the plaintiff was inordinately long and unreasonable. As a result, the borrower suffered substantial loss of USD200 million.

[28] The background of the project must be examined carefully to appreciate the due diligence exercise and verification conducted by the plaintiff for the purposes of the restructuring and the additional facility. Firstly, under the main facility agreement the total amount of USD70 million was fully drawn down and not a single repayment has been made.

[29] Secondly, the development, construction and completion of the amusement park and commercial complex to be known as "Magic Goat Paradise" was scheduled to be completed in time for the 2008 Beijing Olympics. In 2008, the project was 75% completed and at the time when the additional funding was applied, the said project was still at 75% completion. This fact was confirmed by DW2, Chen Ying, during cross-examination:

Q: In 2010 when you applied for the additional facility what was the stage of completion?

A: 75%.

Q: What about today?

A: It is still 75%.

[30] On 8 December 2010, the borrower was given a checklist of the documents as well as information required by the plaintiff for the due diligence and verification exercise (re: p. 339-340 A). Unfortunately, there was no positive response forthcoming from the borrower. The plaintiff issued a letter dated 18 February 2011 to a Mr Li Song Lin, the Director of the Tiexi District Government proposing a meeting to discuss and resolve outstanding issues with regards to the project, in particular the legality and validity of the mortgaged project land. The borrower had maintained that the project land was properly procured and mortgaged however, the plaintiff required independent verification.

[31] The plaintiff appointed legal advisers in China to undertake the verification exercise. Discussions were held on 12 April 2011, 13 April 2011, 27 November 2011 and 11 November 2011. A list of outstanding issues was prepared by the plaintiff and forwarded to a Mr Shen Weimin, the Director of Service Industry and Tourism Bureau of Tiexi District (re; p. 80-86 E).

[32] The issues are as follows:

(i) The project land was intended for public welfare undertaking however, the land use has been changed to commercial use. The plaintiff wanted to know which level of the Chinese Government is authorised to approve such change of the land use; and

(ii) The land use rights of the project land was acquired through leasing, therefore whether such acquisition is in compliance with the laws and regulations.

[33] The Tiexi District Authorities were to assist the plaintiff in resolving the outstanding issues affecting the project land under the PRC laws. However, as at August 2013 there was still no response with regards to the verification of the status of the project land.

[34] Furthermore, one of the guarantors of the facility, Mr Sun Chang Song, was detained by the police and ultimately sentenced to ten years imprisonment.

[35] PW2 was part of the legal team and was actively involved in ensuring that the loan documentation of the RA and the additional facility were in order as well as the fulfilment of the CP. In his witness statement and during his cross-examination, he explained in detail how the due diligence and verification exercise was conducted. PW2 had meetings with the Director and Deputy Governor of the Tiexi District to discuss the progress of the project and other outstanding issues with regards to the mortgaged project land. A list of the outstanding issues were prepared and forwarded to the officer of Tiexi District Government. PW2 also wrote to the borrower's director Mr Sun Changsong requesting for information and documents.

[36] Despite reminders, the plaintiff did not receive any response or verification from the Tiexi District Government on the outstanding issues. The plaintiff through its solicitors, Messrs Skrine, wrote to the borrower's solicitors, Messrs Cheah, Teh and Su, requesting for the borrower's cooperation for information and documents.

[37] The borrower, however, challenged the plaintiff's rights of appointing solicitors in China to undertake the due diligence and had requested the plaintiff to provide official letters of authorisation of the appointments.

[38] The borrower, through its solicitors, responded on 23 November 2011. However, the information and documents received were incomplete. This was also confirmed by DW2 during cross-examination:

> Q: Do you agree with me that the Plaintiff's bank solicitor had responded to the documents provided in February 2012 by the letter dated 3rd February 2012 asking for more information saying the documents were incomplete and there were still unanswered matters?
>
> A: Yes ... but ...
>
> Q: There is no delay as you had not even provided the documents?
>
> A: Yes.

[39] The defendants failed to establish any evidence of bad faith by the plaintiff. Both the documentary and oral evidence show that the borrower had not fully cooperated in the due diligence and verification exercise thus causing the delay. The plaintiff had conducted the due diligence as well as verification exercise cautiously and in a proper manner. The borrower failed to comply with the condition precedent (cl. 15(vii) RA) and did not provide a second legal charge in order to

comply with the condition of the letter of offer dated 9 August 2010. A second legal charge was required for security for the additional USD55 million facility:

> The Security for the Facility is, but not limited to the following or its equivalent,
>
> 1. A Second Legal charge or its equivalent under the Laws of the people Republic of China over the Project's Land and over the lease right of the Project Land...

[40] Item 15 (vii) of the CP to the RA stipulates:

> ... the Plaintiff shall have received legal opinions from an independent legal firm in China or other acceptable body confirming in the form and substance acceptable to the Plaintiff that all relevant searches on the Project Land on which the Project shall be constructed and situated have been conducted, confirming the legal ownership or rights of land use... and that there are no encumbrances on the Project land confirming that there is no legal impediment to the Plaintiff enforcing any or all of its rights, powers and remedies in respect of the Project lands and Project...

[41] The abovementioned condition precedent was not complied with. PW1 and PW2 gave evidence that the plaintiff had appointed legal advisers in China to confirm the legality and validity of the mortgage and the project land. DW3 admitted in cross-examination that with regards to the legality and validity of the mortgage of the project land remained outstanding and unanswered. As explained by PW2 in his witness statement the Tiexi District Government did not provide any response resulting in a meeting in November 2011 where the plaintiff's representative together with the Ambassador of Malaysia to PRC met with officers of the Tiexi District Government to resolve the outstanding issues on the legal status of the project land. It was agreed that the Tiexi district authorities was to assist the plaintiff in resolving the outstanding legal issues and due diligence affecting the project land under PRC laws as well as written response to the list of issues that was given. Unfortunately, until August 2013 there was no response and verification from the Tiexi District Government despite reminders issued by the plaintiff through its appointed legal representatives.

[42] The borrower, had therefore, failed to comply with the aforesaid CP as required by the terms of the letter of offer. The termination of the facility by the plaintiff is valid due to the non-fulfilment of the CP as set out in the said letter.

A **The Certificate Of Indebtedness**

[43] It is contended by the defendants that there is a manifest error in the certificate of indebtedness as it does not account for the principal sum of USD7,408,333.33 and interest earned in the debt service reserve account (DSRA) maintained by the borrower with the B plaintiff pursuant to the term loan 1 facility agreement. It is further contended that the said certificate does not specify the interest rate, interest periods and details of calculations.

[44] Clause 2.3 of the cash collateral agreement stipulates as follows:

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> (...) the Borrower hereby agrees that EXIM Bank shall be entitled to the custody and the benefit of any and/or all fixed deposit receipts of the cash Collateral ... until the indebtedness shall have been settled in full.

D **[45]** Clause 2.4 of the corporate guarantee provides that all securities held by plaintiff shall be treated as securities for indebtedness and that the corporate guarantor will not make any claim to such securities unless and until the borrower paid all the sum due under the facility. Under the joint and several guarantee, there is also a similar clause not to claim until the indebtedness is paid in full.

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[46] The defendants are the guarantors and are not the borrower. By the terms of the guarantee, the defendants agreed that the said certificate of indebtedness is binding and conclusive (Re: cl. 10.7 of the corporate guarantee; cl. 10.12 of the joint and several guarantee).

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[47] The defendants' stand is clearly misconceived as the guarantee is a continuing guarantee, and meant to cover the whole debt, the subsisting debt as well as the future debts. In *Perwira Habib Bank Malaysia Bhd v. Fast Travel (M) Sdn Bhd & Ors* [1988] 1 LNS 82; [1988] 3 MLJ 210, the court said at p. 211:

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> A continuing guarantee such as the one in this case has been held in the case of *Heng Cheng Swee v. Bangkok Bank Ltd* [1979] 1 LNS 179; [1976] 1 MLJ 267 to include guaranteeing not only facilities existing at the time of the execution of the guarantee but also facilities to be made in the future.

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[48] In the present case, the certificate of indebtedness is clear and lucid. The defendants have not shown that there is any manifest error in the certificate of indebtedness. The principle enunciated by Raja Azlan Shah CJ (Malaya) (as His Highness then was) in *Citibank NA v. Ooi* I *Boon Leong & Ors* [1980] 1 LNS 168; [1981] 1 MLJ 282 when His Highness said *inter alia*:

> We have often said in this court many a time that where the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the judge in chambers, or, for that matter, this court shall not deal with the whole matter under the R.S.C. Order 14 procedure. In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents ... It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate.

[49] In the case of *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 it was held by the Federal Court that:

> A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed.

[50] The defendants failed to prove to this court that there is manifest error on the face of the said certificate. Therefore, it is binding and conclusive against the defendants as guarantors.

The Counterclaim

[51] The first defendant's counterclaim against the plaintiff is for loss suffered as a result of the recall and termination of the facility. The first defendant did not call any witness to testify in support of its counterclaim. It is alleged by the first defendant that it has suffered loss of USD233 million. However, no oral or documentary evidence was adduced by the first defendant to support its claim that it had suffered such loss amounting to USD233 million.

[52] Based on the facts and evidence adduced, the delay was not due to the plaintiff. The borrower did not respond to the outstanding issues with regards to the project land resulting in non-compliance of the CP and delayed the due diligence and verification exercise. Furthermore, the plaintiff's case against the defendants are as guarantors of the corporate guarantee and the joint and several guarantee. The first defendant is not a party to the facility agreement or even the RA.

[53] The burden of proving damages is always on the parties claiming the said damages. In the present case the first defendant failed to prove their damage. In the case of *Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd* [1987] 1 LNS 79 Justice Edgar Joseph Jr (as he was then) said:

> This brings to my mind the famous words of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel* [1948] 64 TLR 177:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

[54] However, in the present case the first defendant failed to adduce any it evidence, oral and documentary, that it suffered the losses.

Conclusion

[55] I have considered both the oral and documentary evidence adduced in its entirety together with the submissions of both counsels as well as authorities tendered in support of their respective cases. I am satisfied that the plaintiff have proven their claim against the defendants on a balance of probabilities. Accordingly, I allowed the plaintiff's claim against the defendants with cost. The first defendant's counterclaim is dismissed with cost.

[56] After hearing submission from both counsels on cost, I granted cost to the plaintiff as follows:

(i) Cost of RM50,000 to be paid by the first defendant.

(ii) Cost RM50,000 to paid by second and third defendants.